

**ORAL ARGUMENT — 3/4/99**  
**98-0841, 98-0842, 98-0843, 98-1131**  
**MISSOURI PACIFIC, SOUTHERN PACIFIC & UNION PACIFIC**

NEWMAN: As the court knows, there are 6 TC decisions involved and the issue is, Whether the TC abused discretion in denying the railroad in its motion to transfer venue from Jefferson Co. for 3 cases, and Tarrant Co. for 3 cases, pursuant to the mandatory venue provisions of §15.018 of the Tex. Civ. Pract & Rem Code from lawsuits brought under the Federal Employers Liability Act.

In order to set the scenario, what I would like to do is refer the court to exhibit 1. I would like to show the court that what we have here are 6 lawsuits; 3 lawsuits set in Tarrant Co. are the yellow boxes, and 3 lawsuits set in Jefferson co. are in the red boxes. As you can see from this chart, most of the plaintiffs live outside Texas, and all of the plaintiffs were injured outside of Texas. We have Oklahoma, Louisiana, New Mexico and Louisiana again. Only two of the plaintiffs actually even reside in Harris co.

The point of our presentation is to show that venue is proper for all of these plaintiffs neither in Jefferson Co. or in Tarrant Co., but in Harris Co., Texas under the venue law because Harris county is the supreme center, the management focus of the railroad in Texas.

GONZALEZ: Does it have to be the supreme center for purposes of venue?

NEWMAN: No, it doesn't have to be the supreme center. For purposes of venue, it has to be the principal office of the railroad in Texas.

O'NEILL: It has to be "a principal office". Isn't that a big difference?

NEWMAN: I can explain exactly how the language of the statute came about through the legislative history, and I don't think it is a big difference. Because the legislature had to account for the possibility that a corporation could have several principal offices in the state of equal power for levels of executives.

O'NEILL: They didn't put that in the statute though did they?

NEWMAN: They didn't put it in the statute, but they clearly put it in the legislative history. And the statute, I believe, to some extent is ambiguous because it says that, It is a principal office. However, the statute also says that the lawsuit can be in the county where the defendant's principal office in this state is located. And they merely then defined what a principal office is. And it is a place, or a principal office where the decision makers for the organization within the state conduct the daily affairs of the organization. And then they go on to say, That the presence of a mere agency

or representative is not sufficient. And I think that if there can be more than one principal office, and I think you have to concede that in some cases for some corporations and some structures, there will be more than one principal office, because you could have two offices, two divisions in the state for some company with equal vice presidents, and they are basically two management focuses that are equal in the state. In the legislative history, that was contemplated. I think it is very important at that point then to look at the structure of what the Union Pacific RR is in Texas. And the Union Pacific RR management focus where the decision makers within the organization make the decisions, run the day-to-day operations of the company are in Harris Co., Texas.

There are numerous executives in Harris Co., Texas. There are none elsewhere in the State. If you take Jefferson Co., there is purely a manager below the level of a superintendent. There are executives all in Harris Co, then there are superintendents in Harris Co. Superintendents operate a region of the RR. There are 6 of them in the state. But they only have authority within their own region. They do not have authority throughout the state. So what's really important is that in Tarrant Co. there is a superintendent. He's clearly an agent or representative of the RR.

GONZALEZ: Isn't he making decisions for the daily operations of the RR?

NEWMAN: He makes decisions for the daily operations of the RR within Tarrant Co. only, not for the state. He is not the management focus for the state. He, in fact, reports to Harris Co. And that's critical. And, again, the manager in Jefferson co., he actually reports to a superintendent in Louisiana, who then reports back to the people in Harris Co. So everybody with some authority to make decisions has to report back to the real authority for the RR in the state of Texas, which is located in Harris Co., Texas.

HANKINSON: What if the State of Texas were divided in two, and you had a comparable office out in Potter Co. in the Panhandle to the one in Harris Co. How would the statute operate under your interpretation of it?

NEWMAN: I believe there would be two principal offices of the RR if the quantity and level of management focus was the same. However, if there were a chief executive officer in one place and a vice president in another place under our scenario of the statute, the place with the highest ranking or the president would be the principal office.

HANKINSON: Given your interpretation of the statute, what is the burden once the venue facts have been controverted, the burden of proof to show principal place of business by the plaintiff to maintain it in the county that they chose to sue?

NEWMAN: The burden shifts from the filing plaintiff to the defendant to show that Harris Co. in these cases is the principal office of the RR in Texas. And we believe we have more than met

that burden through the depositions of several executives and through the affidavits of several executives.

HANKINSON: If a plaintiff is taking the position that the county of suit is the principal place of business, what would their proof need to look like?

NEWMAN: Their proof would need to exceed the level of authority that we presented exists in Harris Co. Their proof would need to show that there is the management focus for the entire state out of the county in which they are referring to. Because under the scenario that they are trying to promote, there would be venue for the RR in so many places in Texas. And the legislature in trying to limit venue, which was clearly the legislative intent when this venue statute was re-written, did not contemplate in any of the legislative history for many places throughout the state.

HANKINSON: I guess my question is, because of the use of the word "principal" in the statute, does it infer some sort of qualitative difference in terms of the proof as compared to what we are used to under the venue statute? For example: if you were to show the county where the cause of action accrued, you would show where the car wreck occurred or whatever. And so it's one type of fact. "Principal" seems to connote some comparison as opposed to not just the county of suit, but also how it compares with what may be occurring elsewhere in the state. So is there any special proof requirement given the use of the word "principal" in this venue statute?

NEWMAN: I think so. And I think it's a factual proof that's required to show that the county of venue that the RR says is its principal office, is the county where it has the management focus and the highest ranking executives. Because in the legislative history, the legislators talked about the rare instance where there might be more than one principal office in the state. And it specifically spelled out that this was designed for those companies who may not necessarily have a central location where the decision makers are located but may have three or four locations throughout the state where the decisions makers are at an equal level. But what they went on to say is that, There may be more than one principal office but it's going to be in a very, very small number of cases where you cannot distinguish the difference in the power basically. In other words, where there might be a lot of managers. But if the president of the company is in a county, that's where the principal office is where the highest ranking people who make the management decisions that reach the entire state.

PHILLIPS: How do you square that argument with Sen. Biven's purported amendment to put the word "primary" in, and Sen. Montford's candid response on the floor of the senate, that Senator Bivens' amendment would tighten up venue quite a bit and would reduce forum shopping a good bit more than his language but that his language had been agreed to by everybody, and Sen. Bivens' would start the battle again, and the senate rejected it 23 to 7?

NEWMAN: But that's the reason that I made up that legislative chronology chart.

PHILLIPS: But you left the part that I just referred to.

NEWMAN: I think what's important to note is that when the bill had already been agreed to in the House, it then went to the Senate and that's the time you're talking about is the April 11 to 19 time when the Senate is talking about inserting "primary". The bill was already agreed to. Senator Montford said, That he did not disagree with the spirit of that proposed amendment. But he was in a particularly touchy situation because the bill had already been agreed to. But what he said is, That's why we are going to use the nerve center test. When that nerve center test is applied and should be applied as it was adopted its' even a tighter situation.

PHILLIPS: But how could it be tighter than what you're telling us, which is that you only can have 1 county in the state unless there is 2 or more counties with equal management power?

NEWMAN: I mean tighter than if you just had a primary decision maker.

PHILLIPS: For what you're arguing this language says, it doesn't seem to me that Sen. Bivens' amendment would have tightened that up at all?

NEWMAN: You know, I don't think it would have either. And I think we would be here anyway. But I think he responded to not putting in the word "primary" by saying, Basically we don't need it, we have the nerve center test, and the nerve center test is going to dictate that the management focus where the high level executives run the day-to-day affairs are located.

PHILLIPS: Well he said, It was more than an agent, and it was more than just having a franchisee. And he said, If you want to tighten up the bill even more vote with Sen. Bivens.

NEWMAN: He did, but then what happened was, they were trying to make sure they had more than an agency or representative, so it went back into the house and the house added the sentence, The mere presence of an agency or representative does not establish a principal office. And I think that elevates it right there. We have clearly stepped away from the agency or representative which is arguably what exists in Beaumont, and clearly what exists in Tarrant county.

ABBOTT: What if you have a situation considering facts perhaps in another case that may come before us where you have a small corporate headquarters, let's say in Dallas, you have the president and the CEO. But unequivocally, unquestionably the vast majority of operations are conducted out of Houston, other than a token 12 people in Dallas you have 2,500 people in Houston conducting all of the operations. How would you categorize that?

NEWMAN: Under the nerve center test, the highest ranking official would be where the venue would lie, because they rejected the operations test. The operations test would apply - and that's one of the things that they tried to do in Jefferson Co. was say, Well the operations are here or

whatever. Well Houston would win the operations test, but we don't believe that's the right test anyway. The nerve center test was the one that was adopted. So regardless of where the operations were if there were plants all over the state that had hundreds or thousands of people working, if the corporate officers ran it out of County X, County X would be where the principal office of the company would be.

GONZALEZ: What if the decision that was the basis of the cause of action occurred in the county where the major operations were - I mean the legislature inserted the phrase "decision makers", and I'm trying to see whether or not we need to focus on that and try to define what does that mean.

NEWMAN: They tried to make a rational relationship between decisions that would actually have any bearing on perhaps the incident that occurred. But the plaintiff has two other choices of venue. It need not go to the principal office of a company. It can sue where it occurred, the witnesses are there. It can sue where the plaintiff resided at the time, and those places may or may not have a definite connection to decisions either.

GONZALEZ: So if we have two equal regional offices, say one for administration and a headquarters for operations, and someone is injured as a result of a decision made at the regional office for operations, venue is still appropriate in the regional office for administration?

NEWMAN: The FELA statute contemplates the personal injury. And I don't know how to answer the scenario that you are presenting. But I can answer it in the personal injury context, which is what applies in my cases. And basically if the decision, or action, or inaction was in a certain place, that would be where the accident occurred. And the plaintiff would have a right to sue there.

GONZALEZ: But would the plaintiff have the right to sue in the regional office where the administration?

NEWMAN: No, the plaintiff would have the right to sue in the place where the decision makers conduct the daily affairs of the company in the state.

GONZALEZ: Even though they are equal rank?

NEWMAN: Then either place.

GONZALEZ: So it doesn't matter that there were no decisions made at the regional office of administration?

NEWMAN: No, it doesn't matter. Under the statute and under the scenario of the

legislative history, they can sue in either place. But that is not the scenario of the Union Pacific RR. And the scenario of the Union Pacific RR is that Harris county is the place where all of the \_\_\_\_\_ focus lies.

PHILLIPS: So even if the pleadings here had been that the manager in Jefferson county made the decision that caused the accident in Port Allen, Louisiana, it's your position that this statute when it refers to 'decision makers' for the organization within the state referred back to the nerve center?

NEWMAN: That's exactly right. Because it's almost like a respondeat superior of the company, the corporation is responsible and the people that are in charge of the corporation or responsible for the actions of its employees and managers.

ENOCH: And your point is, it's a relative thing. We have to look at the particular business, not the function that's performed to determine this principal issue. If Harris county, Houston, didn't exist, and all you had was 3 superintendents in the state, then the principal place of business would be where the superintendent was, because that's the major decision maker in the state?

NEWMAN: Exactly.

ENOCH: So if a company does a lot of business in the state and has a lot of operations in the state, but the CEO and the and COO want to go live on a lake in Mt. Vernon and they move there, then that county becomes the county of the principal place of business?

NEWMAN: If that's where they office, yes. I think if you look at the chronology of the legislative history, I think the fact that principal office did not have primary before it is basically a red herring. A principal office is a principal office. Whether it's a primary principal office or a subprimary principal office, we would still be here talking about it. And that's why Sen. Montford suggested and adopted the nerve center test to have some guidance for the courts to know that the nerve center is where the corporation radiates out to its constituent parts in a state, and from which its officers, of which all the executives are in Harris county direct, control and coordinate all activities without regard to locale and in furtherance of the corporate objective. And we are certainly not saying that people that work for the RR at all levels cannot make decisions. But that's not the definition of decision maker in the statute or as contemplated by the legislature.

GONZALEZ: You're talking about the location where the decisions are made statewide for the organization or regional wide for the organization?

NEWMAN: Yes. And it's not to say that someone couldn't be traveling somewhere and make a decision while they are in a different county, just like this court can't say that it's not in

Austin although it's now sitting here in Tarrant county today. It's where the base is, where the chief operation is. Luckily, we don't have a state income tax. But if we had a state income tax, we would have to file it from our base of operations, the RR would have to file it out of Harris county, because that's the county where its chief executives are in the state, the highest ranking executives who make the decisions that run the RR in the state of Texas.

There are other people that have management responsibilities that can make decisions in different places. But they are not the types of decisions that permeate out to and encompass the whole state. They are decisions that are based on policy that is actually made in Harris county, Texas, and that originates from its headquarters in Omaha, Nebraska. But it funnels from Omaha to Harris county out to the state.

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RESPONDENT

MOORE: While the RR accuses the plaintiffs in this case of blatant forum shopping, it asks the court to expressly adopt what the legislature considered and rejected.

HANKINSON: What does "principal" mean in the statute?

MOORE: "Principal" means "a office". And it can be more than one office and it' where the decision...

HANKINSON: No, what does "principal" mean? What is the common meaning of the word "principal"? Wouldn't we need to look to that?

MOORE: Someone who has the authority to act on behalf of the corporation.

HANKINSON: Just the common meaning. Does that not connote chief or some relative principal?

MOORE: I think in traditional, for example, in respondeat superior law it would connote chief or relative, but as the court knows in the agency representative context it's not the tortious type of agency or representative that we're talking about.

HANKINSON: When you look at the statute, not looking at the definitional section, but just the use of the word "principal" in the statute, what does that mean?

MOORE: I don't understand.

ABBOTT: Why don't you define what you think "principal" means?

MOORE: Someone who has the discretion from the corporation to act on behalf of the corporation and to exercise their discretion.

PHILLIPS: What managers are there in the state of Texas?

MOORE: We don't know on the record before us how many managers are in the entire state of Texas. We know that there are four managers in Jefferson county: a manager of train operations, which in this case, that manager has the ability to bind and act on behalf of the corporation, on behalf of the RR. And it's significant to look to the record in this case because while the RR argues that nobody in Jefferson county can make any decisions that affect anything outside Jefferson county immediately, Jerry Swain is the manager of the train operations in Jefferson county, and he makes decisions on a daily basis according to the testimony of Merick Walton, the Solicitor General, that extend all the way into Louisiana. Because his territory extends into Louisiana. So certainly, he can make decisions that affect not just Jefferson county, but can affect another state. So the proposition that it can't is just not correct.

HANKINSON: Is there any concept incorporated in this amendment to the venue statute that requires consideration of the relative authority of one office as compared to another?

MOORE: No, there is not.

HANKINSON: So all a plaintiff need do is go in and show someone at a particular level in the corporation's authority and that's sufficient?

MOORE: I think that's correct. If the plaintiff demonstrates that there is a decision maker, that's in this case the definition of principal, someone who can bind the corporation and has discretion to act on behalf of the corporation, that's sufficient. I don't think that the TC can engage in the balancing test if there is somebody that's more primary than I. For example: the RR takes the position that it can only be the executives or the officers of the corporation. The RR concedes by the way at oral argument at the TC that a superintendent is a decision maker. They make serious policy considerations on behalf of the RR. And Solicitor General Walton testified in his deposition that it really starts even lower than that, the decision maker start at the management level.

ABBOTT: Under your theory then, if you had a company that had multiple stores or offices throughout the state, for example, Walmart, and let's say that Walmart did not deal with franchisees, every town that had a Walmart would be a potential venue forum?

MOORE: I don't believe so. For example, if we use your analogy of a Walmart manager, that is directly employed by Walmart, while he or she may make decisions regarding the daily affairs of the operation at Walmart, that is consistent with what the RR is arguing. They don't make any decisions that affect anything outside of their immediate control. For example, if they shutdown a



Walmart in Ft. Worth, Texas, it will not effect another Ft. Worth Walmart and it won't effect a Walmart anywhere else. So it just doesn't extend beyond that. The RR is unique in this instance, because a RR manager can make a decision that effects people even outside the State and certainly outside the region. So I think that's what's the distinguishing characteristic of what makes the RR unique, and which exemplifies that what we're arguing is not that the court hold that this is a Jiffy Lube bill, so somebody could go in and sue a Walmart or sue a Jiffy Lube. That's not what the plaintiffs are asking. But if they have the ability to bind the corporation and they are more than an agent or representative, and I think on this record, they are more than an agent or representative, because it's so different than the *Ruiz* case, then they have the ability to bind the corporation under the statute and venue is proper for that reason.

OWEN: When the legislature was dealing specifically with RR in the FELA venue provision, which we all know deals with RR, it didn't say "a county in which there is a principal office." It said "the county," didn't it?

MOORE: That's correct. But also in the specific FELA statute under 15.018, the principal office is defined in 15.001 of the definition section of the venue statute. So I think we have to take the general definition of "principal office" and construe it with the principal office in 15.018. I think that they have to be read together. And I think the legislative history in this case is so significant, especially with regard to the nerve center test and what the "principal office" means. If the court looks at the legislative history, when Sen. Montford was addressing the senate executive development committee on April 11, he actually said, They cannot work out a bill, so we've come up with a bill. And the bill was the "principal office." That is the instance where he said, In this bill we've adopted the nerve center test. There has to be a nexus between the act or the event, or the entity. But then if the court will look closely at the history and this is critical, he stopped and said, We think we are about to work something out. If we can take 1-1/2 hour break and go outside, I think we are about 3 words away from having a consensus on this bill. And he came back in 1-1/2 hours to the committee and they had changed the 3 words, and one of those words was it went from "the principal office" to "a principal office. And that's significant because when they changed from "the principal office" to "a principal office" they disregarded the nerve center test. And if they hadn't done so, it would render the bill meaningless because Sen. Bivens proposed exactly what the RR is arguing in this case.

HECHT: Sen. Montford said on the floor that from changing from "the" to "a" this is what he meant: It should apply to a very small number of business whose organizational structure is such that their presence in perhaps 2 or 3 counties is equally as strong.

MOORE: That's correct.

HECHT: That can't be said of the RR here.

MOORE: Well he went further though and he said, Where there is a strong presence. And then Rep. Duncan when he was debating H.B. 6 said, There could be 3 or 4 or 5, we don't know. And Sen. Montford said, There could be 2 or 3. But they both said it's going to have to be on a case-by-case basis.

HECHT: But he also said, Equally as strong. So he just misspoke there?

MOORE: I think he said equally as strong. And then he went further I think in his comments and said, A strong presence. I think Beaumont is a strong presence.

HECHT: Well it's not equally as strong.

MOORE: I don't think equally has to be identical though. I don't think for example, that because Harris Co. has demonstrated that there are more decision makers perhaps then the only way they can have another principal office in Texas is if they had another office that's equally as strong. And I think the RR has conceded that because in open court when the RR conceded that there are 6 solicitors, and the 6 solicitors are decision makers and they make serious policy decisions for the RR, if those 6 superintendents are spread out to 6 different counties, then there could be 6 principal offices under the RR's own admission.

HECHT: I'm not sure how much weight to give these words. Surely it can't be said that Jefferson and Tarrant county have equally as strong RR offices as Harris county in this case, or do you think it can be?

MOORE: I think that on the record before the court it doesn't appear that there is a strong of a presence. But it makes me want to address something that I think is also critical, and that's the standard of review in this. And that is, the TC was commended to only consider the plaintiff's undenied venue facts and the prima facie proof. And the undenied venue facts is that in Jefferson county there are managers and management personnel who have the ability to hire and fire and make management decisions. The prima facie evidence by Merick Walton supports that and says at page 52 of his testimony: First the manager, then the superintendent, then the general superintendent and ultimately the general manager would resolve issues relating to problems in moving trains. So if the question is, Which train to build first, which train to get out of the yard first, those decisions can be effected on a local basis by the decision making authority of managers, superintendents, etc. And we have a manager in Jefferson county.

HECHT: Your position is, if every other RR manager in Texas were in Tarrant county, say, but there was one in Jefferson county, if the plaintiff puts on proof of the one in Jefferson county, then that's all he's got to do for venue?

MOORE: I think if the plaintiff puts on proof that there is a manager who has the

decision making ability, like Mr. Walton said, that's sufficient for its prima facie proof.

GONZALEZ: Don't you have to look at other jurisdictions; otherwise, what's the purpose of the word "principal"?

MOORE: I don't think that the TC could look for example to the Harris county evidence, and this is why. Since it's a venue determination, the TC was required under rule 87.3 only to consider the plaintiff's undenied venue allegations and only the plaintiff's proof.

HANKINSON: Yes, but if the statute requires the plaintiff to prove more through its prima facie proof beyond what is occurring in Jefferson county, so that the plaintiff has to show not only what it's in Jefferson county, but also relative to what may be occurring in other counties, then there could be a failure of the plaintiff's prima facie proof?

MOORE: If the statute required the plaintiff to go further that could be true. But the statute requires that the plaintiff adduce prima facie evidence that it's a principal office in which the daily affairs of the RR are conducted.

HANKINSON: But in this case, the plaintiff's prima facie proof is limited to what is occurring in Jefferson county, is that right?

MOORE: I think the plaintiff did not go further and did not have to go further and prove whatever was going on in other counties as soon as he or she produced prima facie evidence that venue is proper in Jefferson county because there is a decision maker. And Mr. Walton said 4 or 5 times, that it's conducting in the daily affairs, then that's enough.

ABBOTT: But compared to the Walmart situation is insufficient for someone who conducts the daily affairs of the Walmart in Tarrant county or wherever, because that's not conducting the affairs for the organization. And how is the manager in Jefferson county conducting the daily affairs of the organization if you consider the organization to mean the entire company?

MOORE: The way that the manager in Jefferson county that is doing it is different than a Walmart manager would be, on this record for example, there are two trains that originate in Jefferson county and three that end up there, and the manager is the person who decides whether the trains go or stay. The manager is effecting decisions. If he makes a decision in Jefferson county it can effect Southern Pacific's rail line in Louisiana, which is part of his territory or as far West as El Paso. He is effecting the day-to-day operations of the RR because it's so unique because its transportation. The Walmart parallel is different because a Walmart manager would not effect other Walmart stores by a decision that a Walmart manager makes for example in Ft. Worth.

HECHT: You said a couple of times that the RR is unique. Would your view of this

statute as it applies to the RR affect other businesses? Can you suggest other businesses it would affect?

MOORE: I think an example that may be sort of similar would be Continental Airlines or an airline may be sort of similar to the RR. Because a decision that's made for example by an air traffic controller in an airport in Houston, Texas if air traffic controllers were employed by Continental like they are in the RR context, then that could affect travel, not just in Texas but all over the US. They could affect cargo, passengers. It affects more than just the venue where the plaintiff is seeking to file the lawsuit.

I also want to address the standard of review. The RR has contended that the burden of proof shifts, and I think because they did not change the burden of proof under the venue statute for the plaintiffs in this case, the burden never shifted after the RR alleged that Harris county is also a proper venue for the plaintiff to come and adduce additional evidence. The plaintiffs' proof in this case demonstrated compliance with 87.3 that there is a principal office, that there is a decision maker in Jefferson county, and then at that point the inquiry ended. It would have been an abuse of the TC's discretion under the *Wilson* case to do anything other than retain the case on the court's docket.

ENOCH: The result of the *Ruiz* case was to say that you have to have a place where you're doing business and you have to have someone with the discretion to do business on the part of the company. If we accept your understanding of what principal means here, then this statute is nothing more than a codification of the *Ruiz* case, right?

MOORE: No, I think it's more than that because they actually picked up the language from *Ruiz* and they said it has to be more than a mere agency or representative.

ENOCH: So it only has to be a place where they do business and there is a person there who can make a decision that is a corporate type decision. Essentially it's the result in *Ruiz*, that's what this statute produces?

MOORE: I think that it's more than the reason. I think when you look at the legislative history, Sen. Bivens wanted it to be the primary decision makers, and they said, No. Agency or representative they knew about *Ruiz*, and they said, No. So it's somewhere between primary decision maker and a mere agency representative. And they said, A principal office is anywhere where a decision maker conducts the daily affairs, and a mere agency or representative. So we know that it's somewhere in the middle.

HANKINSON: But how did *Ruiz* define agency or representative?

MOORE: *Ruiz* defined agency as someone with a more or less permanent presence in

the county, and a representative is someone who had the discretion to bind. And I think that that's significant in this case, the definition isn't just codified into the statute. And the *Ruiz* facts were so different they had 5 permanent employees. It was Conoco. And they were just monitoring oil wells and went through with one production foreman who came in and out and was not there on a full time basis. He had limited discretion, which is so different than this case where the managers have the ability to stop, start trains in effect outside of the jurisdiction.

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#### REBUTTAL

MELTON: I represent 3 of the plaintiffs that are here before the court today on this venue issue: Mr. Smirl, Martin & Williams. These gentlemen, the facts of their case are slightly different from the cases in Jefferson county. There is a superintendent for the Union Pacific RR who is in charge of operations at his level in Tarrant county. All 3 of these cases were filed in Tarrant county and Judge McCoy maintained venue here in Tarrant county and the 2<sup>nd</sup> CA affirmed.

PHILLIPS: How big is the district that that superintendent is responsible for?

MELTON: I will tell you that because of my studies of legislative intent and my interpretation and belief of what the legislature intended to base venue upon did not have to do necessarily with the size of the operation. I did not focus on the details I would like to be able to give you today. But I will tell you that in my travels and studies of this subject matter, that the Union Pacific testimony has said in various measures of what operation is the biggest, that Tarrant county is second in many cases in size. That would be the number of trains originating in Tarrant county, the number of crews originating and being formed here. And to my knowledge in some respect it is the second largest presence in terms of operations in the State of Texas.

HECHT: Second to?

MELTON: Second to Harris county.

OWEN: Is there any evidence about whether their final decision making authority resides in Tarrant county? Are there any decisions that the superintendent can make that can't be overridden by Harris county decision makers?

MELTON: I agree with my co-counsel that the RR is unique for instance as to Judge Abbott's example of Walmart in that this is by nature a transient business. There is testimony that the business of the Union Pacific RR is to operate trains and we know trains move. There are many decisions for instance, Joe Whellan the superintendent here in Tarrant county makes on a daily basis that he has full authority to make that have to do with the movement of trains that are irreversible. One event at a time. Also we have testimony as the RR conceded in open court is that serious policy

and operational decisions are made by superintendents. As recently as in the Union Pacific's petition for writ of mandamus to this very court, also stated that serious policy and operational decisions are made by superintendents at the superintendent level and above.

OWEN: You put some adjectives on that, but give us some factual examples?

MELTON: A factual example would be whether to run a train or not. And I believe that there are 19 trains that originate on a daily basis in Tarrant county. And the superintendent, Mr. Whellan here in Tarrant county, has the full authority to decide whether that train runs or not, whether the crew that it is staffed with is appropriate, whether the train is loaded.

GONZALEZ: Are you saying that no one in Harris county can override that authority?

MELTON: Certainly can be overridden, but Mr. Whellan is not required to contact Harris county for decisions at this level.

ENOCH: If in interpreting it the way you interpret the statute, you do business in the county and you have a person who can exercise discretion on behalf of the company, then what is the difference between this statute and the result achieved in the *Ruiz* case?

MELTON: I think that the bar has very definitely and the standard has been very definitely raised, whereas prior to the new venue law effective in Sept. 1, 1995, there were 254 counties in which the RR could be sued. Now, on the basis of the facts that I am advocating today, there would be if the superintendent as the lowest level of decision maker in the RR that would qualify and county as proper venue for a suit against the Union Pacific RR, there would be 4 counties in the State of Texas.

ENOCH: How do we determine - we've already said in *Ruiz* this person has to exercise some decision making authority for the company. You say the statute has raised the bar to some other level. What is that? What kind of decision does this person have to make to make it a principal office as opposed to simply exercising a decision that is discretionary, bind the company and they do business here?

MELTON: I must agree. We were at somewhat of a loss ourselves and we relied upon testimony of the executive officers of the Union Pacific RR to help us understand what the RR itself considered to be serious policy and operational decisions.

ENOCH: So your rule would be, would be a serious policy decision, that's the standard? If this person has a serious policy decision making role, that makes it a principal office?

MELTON: We may well use the words of the RR, yes sir, and say serious policy and

operational decisions. When the RR first started exploring the meaning of the new venue law, they began in particular with the two general solicitors who are attorneys and are not connected in any way shape or form. I took the testimonies of the general solicitor of the RR, and all of this is substantiated by his very own words and what you will see is that most of the lines going from the various managers in the RR go straight up to Omaha Nebraska, which of course is the nerve center of the RR being a foreign corporation. The testimony of Merick Walton and where we were trying to get through all these questions is who are the people in the State of Texas that make the decisions that you consider to be conducting the daily affairs of the RR.

HANKINSON: If there are 4 offices in Texas that have superintendents how many counties are comparable to Jefferson county in that the top level person is a manager?

MELTON: I have no answer to that question.

HANKINSON: Do we have any idea if there are a lot of counties or one or two?

MELTON: I do not. I represent plaintiffs that have filed cases in Tarrant, and I focused my attention on the issue of whether a superintendent would qualify. And when these general solicitors began to make their case for choosing the venue for them as a defendant and only being sued in Harris county, among the decision makers that they listed, and I mean consistently they have not backed off from this, they have consistently listed from superintendents on up as general policy making important policy and operational decisions. My belief that the legislative intent was that there be a level of authority higher than agent or representative, significantly higher. And I repeat that what I am proposing here today is that at the very least these 254 counties where agency and representative exposed to Union Pacific RR to lawsuits be raised significantly to where the presence of a superintendent in 4 counties in the state of Texas would qualify that office as a principal office of the Union Pacific RR.

You asked me what activities, what decisions do they make that we as a court can use as a go by. I am relying on the testimony of the executive officers of the Union Pacific RR, that superintendents without further detail adequately qualify as decision makers.

BAKER: If I understand your viewpoint then, you would say that we should focus on what's the lower common denominator level of the decision maker as opposed to going to the top and see who has the highest authority to determine whether there is more than 1 principal office, is that correct?

MELTON: Yes.

BAKER: Because your case is different than Mr. Moore's, he can't get to the level at least from these charts that you propose, because "there's only a manager in Jefferson county, but

there are superintendents in Tarrant county", which is the difference between your two cases?

MELTON: That is the difference. If I had only had a manager to deal with here in Tarrant county, I would have explored more thoroughly to see if I could get input from the officers and the executives that are in Harris county as to whether managers would qualify as well. We only drew the line because we believe there is a bare statutory minimum of the presence of a superintendent. We do not believe that there is a comparison between Harris and Tarrant county. We do know that they have officers galore. We believe that we qualify on the basis of legislative intent that I've studied thoroughly, and the remarks of the authors of the bill.

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#### REBUTTAL

NEWMAN: In response to the proof about making decisions, I think what's critical here is that to focus on the Tarrant county superintendent, the Tarrant county superintendent proof in the record is very, very clear. And he says, I get my directions from Houston. He cannot move a train under his own authority. He must have help or authority. This applies within and beyond the Ft. Worth service unit. So certainly, if this superintendent is testifying and signing affidavits that he cannot move trains under his own authority, but must derive that authority from Houston, it is clear that the decision makers whose decisions radiate to the entire state are those decision makers to whom superintendents report. And under them, to whom managers report.

PHILLIPS: You do agree, we can't resolve any disputed facts at the mandamus level of venue determination?

NEWMAN: I don't believe there is a dispute on this fact.

HANKINSON: How many counties have managers?

NEWMAN: It's not in the record, but there are many, many counties that have managers. I couldn't give you a number, but I would guess in representing the RR for 12 years about 50.

ABBOTT: Which counties have superintendents?

NEWMAN: Ft. Worth, Bexar county, Houston has 4, and I think Longview, Texas has one. They move around. The corporate headquarters don't move around, but the superintendents are frequently moved.

Just to reiterate, I think the facts in the record basically are undisputed because there is no - no one has disputed Mr. Whellan's testimony, and he has basically said that, Hanley's decisions, the general manager in Houston, the highest ranking executive under the VP of



transportation for the whole southern region, and he derives his authority from there. He certainly doesn't have to call them up to ask if he could sneeze, or make a small decision, but he does have to have policies within which he has a framework of following the policies for the RR.

OWEN:                    If the superintendent in Harris county had the authority to move a train as you put it, would that be sufficient?

NEWMAN:                I don't believe it would.

OWEN:                    Why not?

NEWMAN:                Because it's not making a policy that radiates out to the entire state. He still has to operate within the framework of policies set forth in Harris county by the executive and the general managers, and the general superintendents to whom he reports.

PHILLIPS:               How long has there been a superintendent in Tarrant county if these jobs move around?

NEWMAN:                A long time. Many years.

NEWMAN:                A possible explanation of the difference between "the principal office" and "a principal office" may be the difference between looking for the pinnacle of the pyramid and some minimum standard of decision making, which produces a multiheaded thing. So your argument being that since it's no longer the principal place of business, it can't be just Houston because there could be more than one principal place of business in Texas. So maybe what was happening is we no longer focus on the top, we simply look within the structure to see what the lowest level of management meets a certain threshold in which case you've got 4 counties in Texas that would be qualified as one of the principal offices in the state.

NEWMAN:                I don't think that was what the legislature intended and I think when Sen. Montford said on April 19 that businesses that have more than one - in referring to a business that may have more than 1 principal office, I believe it applies to a very small number of businesses, because organizational structure is such that their presence in perhaps two or three counties is equally as strong, and, thus, they may have a principal office in each of those counties. So I think it was clearly contemplated. And the whole amendment to the venue statute was to limit and to be able to determine through very simple discovery where a principal office is located. I think if we start opening the door to the types of decisions someone may make ad hoc on a day that might affect a lot of people in Texas, we're going to go right back to the agency and representative standard, which is specifically prohibited in the statute that we're here talking about today.

BAKER:                    Do I understand your basic position then is where the other two facets of

venue are not present, that the RR can only be sued in Harris county in Texas?

NEWMAN:           The way the RR is structured in Texas at this time, the answer to that would be, Yes.

BAKER:            So there's only one principal office, the principal office here then?

NEWMAN:           Yes.